

**THE LABOR COMMISSION
WORKERS' COMPENSATION ADVISORY COUNCIL**

Wednesday, December 5, 2007 - 12:00 P.M.

**Room 319, Heber Wells Building
160 East 300 South
Salt Lake City, Utah**

The following Advisory Council members were in attendance:

Thomas Bingham, President, Utah Manufacturers Association
David Bird, Esq.
Lane Summerhays, CEO, Workers Compensation Fund
Ralph Astorga, President USWA Local 392
Reo Castleton, SL County Fire Department
James V. Olsen, President, Utah Food Industry Association
Richard J. Thorn, President/CEO, Associated General Contractors - Utah Chapter
Brian Kelm, Esq.
Edward Holmes, M.D., RMCOEH
Brad Tibbitts, Property & Casualty Director, Utah State Insurance Department
Richard Burke, Esq., representing K. Dawn Atkin, Esq.

Others Present:

Sherrie Hayashi - Commissioner
Alan Hennebold - Deputy Labor Commissioner
Joyce A. Sewell - Labor Commission
Robyn Barkdull - Labor Commission
Elena Bensor - Labor Commission
Richard LaJeunesse - Labor Commission
Debbie Hann - Labor Commission
Diedre Marlow - Labor Commission
Lorri Lima - Labor Commission
Aurora Holley - Labor Commission
Dr. Alan Colledge - Labor Commission
Dr. Scott DeBerard - Utah State University
Mark Sanchez - Attorney
Mike Martinez - Attorney
Maggie Kappuk - NCCI
Kenny Atkin - Attorney
Robert Gerhrke - Salt Lake Tribune
Scott Desmond - USA
Hal Davis
Dr. Leon Phaler - Rocky Mountain Center for Occupational and Environmental Health

WELCOME

Commissioner Hayashi brought the meeting to order at 12:00 p.m.

1. Approval of Minutes -

Tom Bingham moved that the minutes of the September 26, 2007 meeting be approved. **Ralph Astorga** seconded the motion which passed unanimously.

Commissioner Hayashi expressed condolences from the Commission for the passing of Senator Ed Mayne and remarked what a great friend the Commission had lost. She said the Commission had prepared a resolution in his honor and asked the Council members to also approve and sign it. It will be presented to Mrs. Karen Mayne in a future setting. The resolution is included at the end of the minutes.

MOTION: Tom Bingham moved to approve and have the Council sign the resolution honoring Senator Ed Mayne. **Rich Thorn** seconded the motion which passed unanimously.

2. Update of Legislation – Alan Hennebold, Deputy Commissioner

Alan Hennebold presented legislative items which had either been drafted or were being considered. He said some had been discussed at Council meetings previously, and other new items had come from outside of the Commission.

The first legislative item, proposed by the Commission, is to remove the Adjudication Division's responsibility for overseeing the managing of dependents' benefits. He said the Commission had anticipated this bill would be sponsored by Sen. Mayne, but his illness took a turn for the worse before he could open a file for the draft bill to accomplish that. If Karen Mayne is appointed to that position, she will likely step into his role and carry that bill. Consequently, there is not a draft at this time.

The second Commission item is the proposal to penalize employers who persist in directly paying workers' compensation benefits to or on behalf of injured employees. Again, **Sen. Mayne** had agreed to sponsor this bill, but **Sen. Dmitrich** will now be the bill's sponsor. However, again due to the delay in reassigning the bill, there is no draft proposal. He said this same item has been incorporated into another bill and perhaps the language in that bill will serve as the basis for a stand-alone bill from the Commission on the same subject.

A new proposal, coming from outside the Commission, is being proposed by **Sen. Hickman** and deals with social security offsets against workers' compensation. This is still in the drafting process. Richard Burke and the Utah Trial Lawyers' Association have provided the Commission with a proposal dealing with the Uninsured Employers' Fund authority to make payments. This is still in the evaluation process by the Commission.

Mr. Hennebold said Richard Burke is also suggesting that the Labor Commission be mandated to complete their agency review of appeals of the administrative law judge decisions within 90 days. This proposal was also just received by the Commission for consideration.

Mr. Hennebold said Jim Olsen had mentioned his desire to go forth with legislation addressing the King decision which Mr. Olsen would expound on following **Mr. Hennebold's** remarks.

Mr. Hennebold also said the Administrative Rules Committee of the Legislature has been going through statutory provisions in an attempt to remove criminal sanctions based upon conduct which was made unlawful by a rule. They have identified one provision in the Workers' Compensation Act which establishes a misdemeanor penalty for doctors who fail to submit reports required by the Commission. The removal of this language is not perceived as a problem if it were to be removed from the statute and should go forward through this session.

Commissioner Hayashi suggested the Council discuss each of the above mentioned legislative proposals and allow anyone from the public to make comments as well.

Mr. Hennebold explained that Rep. Morley was sponsoring legislation entitled "Employee and Employer Obligations Related to Workers' Compensation". This bill incorporates the Labor Commission's direct pay

penalty provision and has also incorporated the King decision which **Mr. Olsen** was proposing and asked **Mr. Olsen** to further explain the bill.

Mr. Olsen explained the King decision involves the situation where an injured worker with a temporary disability is released for light duty, but cannot return to work because of incarceration, termination due to the intentional abuse of a controlled substance, intoxication on the job, or other similar reasons, and is collecting both medical and wage benefits. This legislation would entitle the injured worker to the medical benefits, but would not entitle them to wage benefits when the work opportunity was there, but they are unable to return to work because of incarceration or other reasons.

Brian Kelm was very concerned about this proposed legislation stating it was mean-spirited and too overbroad. He felt it penalized children and families of the incarcerated employee.

Mr. Olsen reminded council members that if an employee were not on workers' compensation disability and was fired for any of those same reasons, he would also lose wages. He added that Workers' Compensation is not a social welfare program and should not be treated as such.

Mr. Hennebold pointed out the scenario if an employee was tested and found to have alcohol in his bloodstream, he could be fired. But being able bodied, he could go out and get another job. An injured worker however, brought back on light duty, may not be able to get a job anywhere else – not because of being fired for the abuse, but because of the injury.

Mr. Burke stated he felt the bill was too loosely worded in regard to "presumption" and "for good cause". Also a "clear and convincing" standard of evidence to rebut a presumption is nearly a criminal burden of proof standard. It may be well-intentioned, but it undercuts the purpose of the Act.

Mr. Olsen encouraged members to meet with the sponsor and work through some of the issues. He said he did not expect the Advisory Council to make any recommendations today, but had presented the proposal for informational purposes.

Mr. Mike Martinez – Attorney, spoke to the Council regarding the proposed bill being discussed. He was concerned the bill was discriminatory toward Hispanic workers and felt the Workers' Compensation Act is intended to be inclusive of all workers. He said this bill takes away the powers of the Labor Commission to adjudicate disputes between the insurance company and the employee. He felt it was not an employee/employer obligation bill as the title states, but addressed "Employee Cooperation" only. He felt it gave the employers unfair immunity.

He said the bill gives the insurance company, through their adjusters who handle the claims, the right to make the determination if the injured employee is fully cooperating in meeting their goals of medical treatment, physical treatment, educational or vocational rehabilitation. It gives the adjuster the right to decide if the employee is making a full cooperative effort and authorize wages to be paid. If the adjuster doesn't believe the employee is fully cooperating, wages can be denied. He felt this was an unfair standard to place on employees and provided no means to adjudicate a dispute fairly.

Mr. Martinez said this bill is also about the adjuster having the ability to determine if someone committed criminal conduct. He felt this language unfairly targeted undocumented workers by giving insurance adjusters the authority to determine if the worker was documented and working legally in the state. He said those employees who do not speak English well will be afraid to file for workers' compensation benefits. He suggested a more fair solution would include proposing a penalty to those employers who hire undocumented workers if the worker becomes injured, and demand that the employer pay all medical costs incurred. That would provide some recourse, because under this proposal, the insurance company will determine the undocumented worker is not eligible for benefits due to their illegal status and will not be

held responsible. He feels the bill is overbroad, over-reaching, unfair and gives employers an unfair advantage.

Mr. Kenny Atkin, attorney, stated this bill changes the statute of limitations on temporary total, temporary partial, permanent partial and permanent total disability to one year in some cases. Then there will be disability claims with different statute of limitations depending upon why the denial was originally done. This is confusing for injured workers and becomes next to impossible to fight.

The second thing he wanted to point out was the language dealing with “reasonable workplace rules” gave employers reasons to fire employees after an injury. He felt the bill brings fault to a no-fault system which is certainly not the intent of the bill. He said there are many problems with this bill and it goes way beyond trying to solving the problems for which it was intended.

Mr. Hal Davis also spoke in opposition to the proposed legislation because injured workers who are on light duty have a very difficult time seeking other employment as many times they are working as a favor from the employer in a job which was created for their light duty status.

Commissioner Hayashi asked if there was further comment, and finding none, went on to the next legislative item. **Mr. Burke** was asked to explain his proposal.

Mr. Burke said his proposal concerned 34A-2-704, the Uninsured Employers’ Fund (UEF). He said current language in the law reads, “it becomes necessary to pay benefits, the UEF will pay benefits.” He said this phrase has been interpreted to mean, “when there is a final order” and it takes a long time to get a final order even in very clear-cut cases. This statute creates an impediment for the UEF to pay benefits. He said this legislation would make it so employees who meet certain basic criteria could be paid for time lost and medical benefits. Under these conditions, UEF could pay the claim without waiting for the final order when liability was not in doubt. He asked that this bill be considered by the Advisory Council and action be taken at this meeting.

Ms. Sewell said she has not had a chance to review the proposal and analyze the information to determine the costs and the implications for the UEF .

MOTION: Mr. Bingham moved to go to the next agenda item. **Mr. Olsen** seconded the motion which passed unanimously.

Mr. Burke said the next proposal dealt with 34A-1-303, Review of Administrative Decision. **Mr. Burke** said currently injured workers may wait up to two to three years to get a final order from the Labor Commission because the Commission lacks the resources to provide a faster appeal. He was proposing legislation be introduced to mandate the Commissioner or Appeals Board to take action for final order within 90 days from the date briefing is completed, and provide the funding source to enable the Commission to do this.

Commissioner Hayashi told the Council that the Commission’s budget request includes two new staff people to assist Alan Hennebold with Motions for Review. This will greatly assist with reducing the time frame for a final order.

Mr. Bird expressed concern that legislation was being considered to try to mandate time periods and inevitably there is always a way to get around the mandated time frame if necessary. It only forces the system to bog down and can’t force the Commission to act when they don’t have the resources. He felt it was more productive to get the resources needed so the Commission could produce the final orders more efficiently.

Mr. Hennebold said in the last few years, the number of administrative law judges has gone from four to seven. During that same time, the Commission and its Appeals Board have actually doubled the number of decisions issued each year. However, the inflow of cases has tripled over that same period. As years go by, the carryover has produced a compounding problem which has become staggering.

MOTION: Mr. Bird moved to go on record as a Council to encourage the Commission to continue to reduce the time for appeals and to support efforts in the Legislature to provide the resources necessary to allow that to happen. **Mr. Kelm** seconded the motion which passed unanimously.

3. Grant Requests from Workplace Safety Funds – Elena Bensor, Workplace Safety Coordinator

Ms. Bensor distributed copies of the 2008 Workplace Safety Account expenditures and approved grants to the Council. She reviewed the approved grants with the members and explained there were two study requests which the Grant Proposal Committee felt would be best heard by the entire Council to determine if they were appropriate expenditures for the grant money. **Ms. Bensor** explained the first study request involved long-term safety and outcomes of lumbar fusion patients, and the second was a study to reduce the risk of lung cancer, chronic bronchitis and other related respiratory diseases of underground miners. She asked that both grant requesters address the Council and explain their studies.

Dr. DeBerard, Utah State University, distributed information detailing his grant application, which involved a low back pain study among Utah workers' compensation patients. He explained that low back pain is the single most costly medical condition for Utah workers' compensation system. He felt there was a need to understand why some people respond successfully to pain interventions and other cases become perm totals. He said that rates of spine surgery are continuing to increase drastically and new procedures are often more expensive than older procedures. He felt the state should monitor outcomes of these newer procedures in an effort to make some prudent utilization decisions. He said the studies he was proposing, using Workplace Safety grant money, would provide a mechanism for doing so. **Dr. DeBerard** was asking for \$58,500 to fund these studies.

Dr. Edward Holmes and Dr. Alan Colledge both spoke in favor of having the Workplace Safety Fund award the requested grant for this study. They felt the money would be well spent in providing evidence-based science concerning low back surgery.

Dr. Leon F. Pahler, Research Assistant Professor at the University of Utah, addressed the Council and explained his study. He said Kennecott Copper Mine would be the site for the study which would determine if an available real-time particulate monitoring instrument could be used as a surrogate for the MSHA standard method of monitoring diesel particulate matter (DPM) in underground mines. DPM is a potential carcinogen. The current method for DPM sampling and analysis requires from eight to 14 days to get the results from the lab. A real-time measurement of DPM would provide information needed in order to rapidly implement health and safety controls and reduce a miner's exposure to DPM. He was asking for \$99,323 to fund his study which would be completed by June, 2008.

David Bird expressed concern that although both of these grant requests to fund studies were worthwhile, he did not feel they were an appropriate use of the workplace safety account as defined by the legislature. He suggested, as did others, that other interested parties in the studies could be asked for assistance in providing funding.

MOTION: Mr. Bird moved to reject the lumbar studies presented by **Dr. DeBerard**. **Mr. Thorn** seconded the motion which passed with **David Bird, Richard Thorn, Tom Bingham and Reo Castleton** voting in favor of the motion. **Brian Kelm and Ralph Astorga** voted against the motion.

MOTION: Mr. Kelm moved to approve the Kennecott Copper Mine site study for real-time instrumentation measuring DPM in underground mines. **Mr. Astorga** seconded the motion which failed

with a tie vote from **Brian Kelm, Ralph Astorga and Brian Kelm** voting in the affirmative and **David Bird, Richard Thorn and Tom Bingham** voting in the negative.

4. Update on Attorney Fee Rule – Commissioner Hayashi

Commissioner Hayashi reported that the responses and public comment on the suggested changes for the Attorney Fee Rule were very broad. She stated that the Commission did accept the recommendation of the Workers' Compensation Advisory Council and the Attorneys' Fees Committee to raise the cap on attorneys' fees. She added that the Rule warrants further review and any recommendations for further improvement and action should be given to **Commissioner Hayashi** for consideration.

5. New Business

Commissioner Hayashi announced that Dawn Atkin had her baby. Cole Atkin was born in late November and the baby and Dawn were both doing great.

The Commissioner asked anyone interested in making donations in Ed Mayne's name on behalf of the Commission or the Workers' Compensation Advisory Council to give donations to Robyn Barkdull.

The promulgated rule on the transfer of benefits has a technical error which will be corrected.

The next meeting of the Council will be held in March unless another is needed sooner due to legislative concerns. Dates will be suggested and the Council will be asked for input.

Commissioner Hayashi adjourned the meeting at 2:45 p.m.

Eddie P. Mayne Memorial Resolution

December 2007

Be it resolved by the Utah Labor Commission and the Workers' Compensation Advisory Council:

WHEREAS, Senator Eddie P. Mayne served over 25 years on the Workers' Compensation Advisory Council, dedicated to seeking fair labor practices in behalf of working men and women throughout Utah; and

WHEREAS, Eddie Mayne believed that all men and women had an equal claim to work in a safe and fair environment, with all of the rights to which they were entitled; and

WHEREAS, Eddie Mayne donated countless hours assisting the Labor Commission with issues facing Utah's workforce, as well as sponsoring legislation supported by the Commission; and

WHEREAS, Eddie Mayne was respected and admired by employer and employee representatives alike for his fairness, integrity and compassion for all; and

WHEREAS, Eddie Mayne was recognized for his great ability to bring opposing sides of labor issues together for negotiating compromises; and

WHEREAS, his friends at the Labor Commission and on the Advisory Council will miss his genuine friendship, dedicated service, and giant presence around our conference table;

NOW, THEREFORE, BE IT RESOLVED that the employees of the Utah Labor Commission and the members of the Workers' Compensation Advisory Council do pledge to carry on with the efforts that Senator Eddie P. Mayne strongly supported and cared passionately about.

BE IT FURTHER RESOLVED that we will remember Eddie as a great friend, a loyal supporter of the working class, and an honorable statesman. We view his passing as a great loss for all.

Sherrie Hayashi, Commissioner

Alan L. Hennebold, Deputy Commissioner

Ralph Astorga, President
USWA Local 392

K. Dawn Atkin, Attorney
Atkin & Associates

Thomas Bingham, President
Utah Manufacturers Association

David R. Bird, Attorney
Parson Behle & Latimer

Reo Castleton, President
Salt Lake County Fire Dept. Local 1696

Edward Holmes, M.D.
RMCOEG

Brian Kelm
Attorney

James V. Olsen, President
Utah Food Industry Association

Joyce A. Sewell, Division Director
Industrial Accidents – Utah Labor Comm.

Lane A. Summerhays, President
Workers Compensation Fund

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